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Via Facsimile (916.464.4797) and First Class Mail

Mr. Robert Reeves
California Regional Water Quality Control Board
Central Valley Region
11020 Sun Center Drive, No. 200
Rancho Cordova, CA 95676-6114

Re: **Draft Cleanup and Abatement Order No. R5-2005-07XX**
For Dixon Commercial Properties, Monfort, Inc. (f/k/a Monfort of Colorado, Inc.), ConAgra Foods, Inc., Greynom, Inc. (f/k/a Armour Food Company), and the VIAD Corporation (f/k/a/ The Greyhound Corporation)
Dixon Business Park - Solano County
Response to Draft Order of MacLaughlin and Company and Dixon Commercial Properties

Dear Mr. Reeves:

This letter will serve as a response to your April 4, 2005 request that MacLaughlin and Company respond to the above referenced draft order. Please be advised that MacLaughlin and Company is acting as the commercial real estate broker for Dixon Commercial Properties ("DCP"), the current owner of the subject property, in the underlying real estate transaction. In that capacity, MacLaughlin submits Dixon Commercial Properties' comments on the proposed order as well.

Before moving into the specifics, MacLaughlin and Company and Dixon Commercial Properties wish to stress to the Board that they continue to desire to work cooperatively with the Board to resolve the problems on the subject property.

I. REQUEST FOR HEARING

As a preliminary matter, MacLaughlin and Company and Dixon Commercial Properties request that the Board conduct a hearing regarding the content of the final order prior to its being issued. Accordingly, please let this response also serve as MacLaughlin and Company's and Dixon Commercial Properties' request for same.

II. GENERAL LEGAL COMMENTS

A. WILLIAM H. MACLAUGHLIN SHOULD NOT BE REFERENCED IN THE ORDER AS HAVING HAD AN OWNERSHIP INTEREST IN THE SUBJECT PROPERTY.

The draft order continues to make a reference Mr. William H. MacLaughlin individually as having had an ownership interest in the subject property. Neither MacLaughlin and Company nor Mr. MacLaughlin have been holders of title to the property at issue. MacLaughlin and Company is only a real estate brokerage firm that manages the property for DCP. Furthermore, William H. MacLaughlin, an individual, did not hold title to the property so as to give rise to liability for cleanup and abatement. While he did sign a sales agreement with Monfort, Inc., he immediately assigned his rights under it to DCP at the time of the initial transaction in which DCP obtained title. Under these circumstances, the order should not refer to Mr. MacLaughlin as an owner of the property for the purpose of allocating liability.

B. DIXON COMMERCIAL PROPERTIES SHOULD BE NAMED AS A SECONDARILY RESPONSIBLE PARTY BECAUSE IT IS A CURRENT INNOCENT LANDOWNER AND SHOULD ONLY BE REQUIRED TO ASSUME CLEANUP RESPONSIBILITIES WHEN AND IF THE PAST OWNERS AND OPERATORS DIRECTLY RESPONSIBLE FOR THE CONTAMINATION FAIL TO CONDUCT A CLEANUP.

The decisional law of the SWRCB authorizes Boards to name as dischargers the current owners of a property where a discharge has or is taking place. See In the Matter of the Petition of Vallco Park, Ltd., (1986) Order No. WQ 86-18, *1 ("Vallco Park"); In the Matter of Spitzer, et al., (1989) Order No. WQ 89-8, *3 ("Spitzer") ("A long line of State Board orders have upheld Regional Board orders holding [current] landowners responsible for cleanup of pollution on their property regardless of their involvement in the activities that initially caused the pollution."). The current owner of the subject property is Dixon Commercial Properties ("DCP").

Although it is appropriate to name DCP in an order issued pursuant to Water Code §13304, DCP should only be named as a secondarily responsible party. Cleanup and abatement orders issued under §13304 can distinguish between parties that are primarily responsible and those that are secondarily responsible. A secondarily responsible party is one which need not comply with an order unless and until the primarily responsible party fails to comply. Spitzer, 89-8, *7; Wenwest, 92-13, *3-4.

Boards often confer secondary responsibility status to current owners that neither caused nor permitted the activity which led to the discharge. Wenwest, 92-13, *4. Here, it is clear that DCP had nothing to do with the operations of Mace, Armour, Monfort, Greynom, ConAgra

and/or Viad. There is also no dispute that DCP had nothing to do with the contamination those entities released into the soil and groundwater at the property.[1] In fact, the Board has found that nitrates and total dissolved solids ("TDS") present under the property resulted primarily from the operations of Armour, Monfort, Greynom, ConAgra and Viad. See Draft Order, at pp. 1-6, ¶¶ 2-18.

DCP fits the classic definition of a secondarily responsible party. It had nothing to do with the meat processing operations at the property prior to its ownership. It merely inherited the contamination because it unknowingly purchased property with substantial nitrate and TDS contamination. The SWRCB employs the concept of equity when considering secondary responsibility. See Spitzer, 89-8, *7. Here, fairness dictates that the prior owners directly responsible for the discharge of contaminants at the property be held as primarily responsible for the cleanup and abatement of that contamination. For over 50 years, and well into the 1980s, they knowingly discharged wastes into unlined, earthen pits. DCP acquired the property to redevelop it, not to continue the negligent and harmful practices of the prior owners and operators.

Accordingly, MacLaughlin and Company and DCP request that the Regional Board name DCP as a Secondarily Responsible Party in the order ultimately issued, and then name Monfort, ConAgra, Greynom, Armour, and VIAD as Primarily Responsible Parties. DCP understands that it is ultimately responsible to clean up and abate the contamination at the property should the prior owners fail to comply with any order issued by the Regional Board.

III. COMMENTS SPECIFIC TO THE TEXT OF THE DRAFT ORDER

The following are MacLaughlin and Company's and DCP's specific comments with respect to the language of the draft order. For ease of reference, the comments are organized with respect to the specific headings and sections of the order which they address.

[1] The Regional Board's Draft Order indicates that DCP removed approximately 6000 yards of fill material and placed it in a waste pile on lots 4 and 9 of the property. The order goes on to state that the fill material included "concrete, tires, metal objects, burn debris, wood, and miscellaneous metallic objects," and that some of the larger objects in the fill material were segregated from the excavated materials and were removed from the property. Finally, the draft order notes that "[a]nalytical testing of the fill material indicated that this material poses no threat to groundwater." (Emphasis added.) Draft Order, at ¶ 17. The order goes on to state that the "past activities" have caused the groundwater pollution at the Site. Draft Order, p.5, ¶ 18.

TITLE AND PREAMBLE LANGUAGE

Page 1. Given DCP's request to be named as a Secondarily Responsible Party, the parties named in the title of the order and its first paragraph should be listed in order of primary to secondary responsibility, i.e., Armour Food Company, Monfort, Inc., ConAgra Foods, Inc., Greynom, Inc., and VIAD Corporation before DCP in both the title of the Order and the preamble language directly following it.

PROPERTY OWNERSHIP AND OPERATIONS

Pages 1-2, ¶¶ 1-5.[2] MacLaughlin and Company and DCP do not have any comments with respect to these portions of the draft order.

Page 2, ¶6. In order to reflect that Mr. William H. MacLaughlin never held an ownership interest in the subject property, other than to "pass through" ownership of the property to DCP, MacLaughlin and Company and DCP request that this paragraph be redrafted as follows:

> *The Site was purchased from Monfort, Inc. (f/k/a/ Monfort of Colorado, Inc., a Delaware Corporation) by Dixon Commercial Properties on May 1, 1989, by means of a sales agreement in which Dixon Commercial Properties took immediate title from Monfort, Inc. under an assignment from William H. MacLaughlin.*

Page 2, ¶ 7. In light of MacLaughlin and Company's and DCP's request that DCP be clearly delineated as a "secondary discharger" in the order, this paragraph should be moved to come later in sequence in the order after paragraphs 8, 9, 10, and 11, referring to primary dischargers ConAgra Foods, Inc., Monfort, Inc., Armour Food Company, Greynom, Inc., the Viad Corporation, and Mace Meat Company, respectively.

Once again, DCP should be designated as a secondary discharger only because it is not responsible for any of the discharge on the subject property. There is no evidence that the creation of the waste pile by DCP was a discharge or threatened a discharge. A discharge is "the flowing or issuing out, of harmful material from the site of the particular operation into the water of the State." 27 Ops. Atty. Gen. 182, 183 (1956); Spitzer, 89-8, *3. The Draft Order does not recite facts sufficient to establish a discharge on DCP's part in that there is no mention or evidence that the harmful materials in the waste pile have commingled with the water of the State, or threaten to do so, as a result of any conduct on DCP's part. See Draft Order at p. 5, ¶ 7

[2]Some of the paragraphs in the draft order lack numbers. This response will refer to such paragraphs by number if such numbering is clear from the context of the draft order.

("[a]nalytical testing of the fill material indicated that this test material poses no threat to ground water"). If anything, the construction of parking lots and the building of foundations by DCP and others has benefitted the water of the State by encapsulating the contamination in the soil at the property and slowing its progress towards and through groundwater.

Pages 2-4, ¶¶ 8-11. MacLaughlin and Company and DCP do not have any comments with respect to these portions of the draft order except to note that they appear to accurately reflect the business and ownership interests and relationships as shown in the diagram regarding same. See Attachment 2 to Draft Order.

Page 5, New Paragraph. Once again, the order should clearly delineate that DCP is a secondary discharger as opposed to the primary discharger status of the other parties. DCP asks that the following paragraph be added in just before the heading "Background" in the order and just after the moved paragraph (former paragraph 7, see above) discussing DCP's status:

> *The Regional Board finds that DCP is a Secondarily Responsible Discharger, whereas ConAgra Foods, Inc., Monfort, Inc., Armour Food Company, Greynom, Inc., the Viad Corporation, and Mace Meat are Primarily Responsible Dischargers. The reasons for this are (1) DCP did not cause or permit the discharges, (2) DCP did not own the property at the time of the discharges, and is merely the current owner, (3) and ConAgra Foods, Inc., Monfort, Inc., Armour Food Company, Greynom, Inc., the Viad Corporation, and Mace Meat caused the discharges.*

BACKGROUND

Page 4, ¶ 12. MacLaughlin and Company and DCP do not have any comments with respect to this part of the draft order.

Page 4, ¶ 13. The last sentence should make reference to the fact that the plan to spread sediments was designed by an engineering firm and approved by the Board.

Page 4, ¶ 14. MacLaughlin and Company and DCP do not have any comments with respect to this part of the draft order.

Page 4, ¶ 15. DCP believes that the water supply wells and associated pumps were closed under a plan approved by the Board. Furthermore, this allegation should be made with regard to a specific primary discharger– Monfort or other primary dischargers as appropriate, as it was solely responsible for the abandonment and/or closure of the wells. The third sentence refers to

a generic "Discharger". Because there are legal and factual grounds to name the former owners of the property as primary dischargers, the reference in the sentence should be to "*the primarily responsible dischargers have not provided any information related to abandonment procedures for these supply wells.*"

Pages 4-5, ¶¶ 17-18. MacLaughlin and Company and DCP do not have any comments with respect to these portions of the draft order.

AUTHORITY - LEGAL REQUIREMENTS

Pages 5-6, ¶¶ 19-22. MacLaughlin and Company and DCP do not have any comments with respect to these portions of the draft order.

Page 6, ¶ 23. The last sentence of this paragraph references "Dischargers" without distinguishing between primary and secondary dischargers. The sentence should commence with "*The Primary Dischargers have caused or permitted . . .*"

Pages 6-7, ¶¶ 24-27. MacLaughlin and Company and DCP do not have any comments with respect to these portions of the draft order.

Page 7, ¶ 28. The last sentence of the second paragraph (under the legal citation to Water Code section 13267) once again references "Dischargers" without distinguishing between primary and secondary dischargers. The sentence should reference the dischargers as follows: ". . . *the Primary Dischargers named in this Order...*"

Page 7, ¶ 29. MacLaughlin and Company and DCP do not have any comments with respect to this part of the draft order.

Page 7, ¶ 30. This paragraph should be rewritten to reflect the varying status of the dischargers:

> *If the Primary Dischargers Armour, Monfort, ConAgra, Greynom, Viad and Mace Meat Company all fail to comply with this Order, the Executive Officer may request the Attorney General to petition the superior court for the issuance of an injunction. In the alternative, the Regional Board may order the Secondary Discharger, DCP, to comply with this Order. If Secondary Discharger DCP fails to comply with this Order, the Executive Officer may request the Attorney General to petition the superior court for the issuance of an injunction.*

Page 7, ¶ 30. This paragraph should be stated in terms of liability with respect to the primary and secondary dischargers as follows:

> *If the Primary Dischargers, or any one of them, intentionally or negligently violate this Cleanup and Abatement Order, the Primary Dischargers may be liable civilly in a monetary amount provided by the California Water Code. If the Secondary Discharger becomes liable for cleanup and abatement under the terms of this order and upon the failure of the Primary Dischargers to comply with the Order, and the Secondary Discharger intentionally or negligently violates this Cleanup and Abatement Order, then the Secondary Discharger may be liable civilly in a monetary amount provided by the California Water Code.*

REQUIRED ACTIONS

Page 8, ORDER. The reference to DCP being subject to all of the specific and following tasks under the order should be removed as DCP is not primarily responsible for the cleanup and abatement tasks specified in the following portions of the order. To the extent DCP is secondarily responsible for same, it suggests that the following sentence be added at the end of the order statement together with reference to it being removed from the earlier portion (line 2) of the order:

> *As a Secondarily Responsible Discharger, Dixon Commercial Properties shall be responsible to perform the following actions if and only if the Primarily Responsible Dischargers, Armour Food Company, Monfort, Inc. ConAgra Foods, Inc., Greynom, Inc., the Viad Corporation and Mace Meat Company all fail to complete the required tasks:*

Page 8, New Paragraph (before current ¶ 1). The deadlines and requirements in the paragraphs following should be directed towards the Primarily Responsible Dischargers, Monfort, ConAgra, Greynom, Viad and Mace Meat. To accomplish this, a prefatory paragraph should be included:

> *The following deadlines and requirements set forth in paragraphs 1 through 27 are imposed on the Primarily Responsible Dischargers. If said parties fail to comply with the deadlines and requirements, then they become the responsibility of the DCP, the Secondarily Responsible Party.*

SITE ASSESSMENT

Page 9, ¶ 2. The requirement that a *Site Assessment Work Plan* be submitted on or before June 1, 2005 may not be practicable because there may not be sufficient time to prepare and submit such a plan. The preparation of such a plan likely will take approximately 30 days. If, however, there are delays caused by such things as collecting soil and groundwater samples, analyzing them to determine the lateral and vertical exten of pollutants, preparing a complete site characterization, investigating the water supply wells, RWQMB processing time, such as delays engendered by preparation and issuance of a final order, then the specified "hard date" of June 30 may be too soon. DCP requests, therefore, that this time frame be set so as to provide 30 days after the preliminary tasks have been completed.

Page 9, ¶ 3. MacLaughlin and Company and DCP do not have any comments with respect to this part of the draft order except as it may be impacted by changed time frames in the previous paragraph.

Page 9, ¶ 4. With respect to the October 1, 2005 time frame specified for submitting a *Site Assessment Report*, that time frame could be too short depending on how long it takes the RWQMB to complete its review of the *Site assessment Work Plan*. DCP requests that this time frame be specified either in terms of a time period after that review has been completed, such as 60 days, or a date certain that is specified to provide sufficient time after the Board's review is concluded and the parties know the relevant time frames.

Page 9, ¶ 5. With respect to the potential need for additional investigation, the 30-day time frame is not sufficient for that purpose. The parties will likely hve to perform drilling, pull permits, obtain data, analyze the date, have lab reports done, and come up with a new plan, all of which are time-consuming processes. DCP asks that the time-frame for this process be increased from 30 to 60 days.

PUBLIC PARTICIPATION

Page 9, ¶ 6. MacLaughlin and Company and DCP do not have any comments with respect to this part of the draft order.

HEALTH RISK ASSESSMENT

Pages 9-10, ¶ 7. The Draft Order currently calls for concurrent preparation of both a *Site Assessment Report* and a *Health Risk Assessment* (both to be prepared by October 1, 2005). DCP submits that these reports should be done consecutively, not concurrently. The reason for

this is that separate consultants prepare these reports and the latter report depends to some extent on information from the former report. The *Site Assessment Report* contains toxicological information upon which the *Health Risk Assessment* is based. In addition, the *Site Assessment Report* is performed by consulting engineers and geotechnical experts, while the *Health Risk Report* is prepared by toxicologists. Such work is usually subcontracted out by the engineers to firms expert in the toxicilogy area. For this reason, it would be more reasonable to provide for at least a 30-day period from when the *Site Assessment Report* is completed for the completion of the *Health Risk Assessment*.

In addition, the reference in the last sentence of paragraph 7 of this section to "[i]nhalation of the volatile components of the waste (e.g., halogenated and aromatic solvents) must be considered an exposure pathway" does not make sense withing the context of this matter. This case involves TD's, nitrates, and ground water issues, but not solvents. As there are no concerns about solvents in this matter, the reference to volatile components is unnecessary and should be deleted.

Page 10, ¶¶ 8-10. With respect to paragraphs 8, 9 and 10, the time frames specified in these paragraphs are likely unrealistic and do not provide enough time for the tasks indicated, particularly if problems arise in the process. For example, with respect to implementing the work plan for the HRA within 30 days of Regional Board concurrence with that plan (see paragraph 8), the time frame specified does not appear to be sufficient to contact potential contractors, conduct communications amongst the various paying parties, and come to agreements regarding contracts for services. DCP requests that these time frames be extended as necessary to reflect potential delays in the process, particularly with respect to the 30-day time frame in paragraph 8. That time frame is too short to implement the plan considering that negotiations with contractors must be conducted and concluded and there must be communication between the primary dischargers as to who will be financially responsible. These processes are likely to take longer than 30 days.

FEASIBILITY STUDY AND CLEANUP

Page 10, ¶ 11. The time frame for submitting a *Feasibility Study/Remedial Options Evaluation Report* is too compressed. While the proposed order does specify 120 days for this period, it also states that the report shall be submitted no later than March 1, 2006, which is only 28 days after the previous phase is to be completed on February 1, 2006 (implementation of the approved work plan for the *Health Risk Assessment*). DCP requests an actual deadline that provides for 60 days for this process to occur.

Page 10, ¶¶ 12-13. MacLaughlin and Company and DCP do not have any comments with respect to these portions of the draft order.

GROUNDWATER MONITORING

Page 11, ¶ 15. MacLaughlin and Company and DCP do not have any comments with respect to this part of the draft order.

GENERAL REQUIREMENTS

Pages 11-12, ¶¶ 16-26. MacLaughlin and Company and DCP do not have any comments with respect to these portions of the draft order.

Page 12, ¶ 27. This paragraph should be rewritten to reflect the varying status of the dischargers:

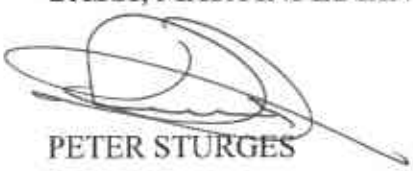
> *If, in the opinion of the Executive Officer, the Primary Dischargers Armour, Monfort. ConAgra, Greynom and Viad all fail to comply with the provisions of this Order, the Executive Officer may refer this matter to the Attorney General for judicial enforcement or may issue a complaint for administrative civil liability. If Secondary Discharger DCP fails to comply with the provisions of this Order after having been ordered to comply with same upon failure of all of the Primary Dischargers to comply with the provisions of this Order, the Executive Officer may refer this matter to the Attorney General for judicial enforcement or may issue a complaint for administrative civil liability.*

IV. CONCLUSION

If after reviewing the above the Board has any questions or comments please do not hesitate to contact me.

Very truly yours,

BASSI, MARTINI EDLIN & BLUM LLP



PETER STURGES